Supreme Court, U.S.
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87-1722

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM G. BARNHART AND LINDA BARNHART,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Bruce F. McKenrick
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QUESTIONS PRESENTED

1. Does the Free Exercise clause of the First Amendment of the United States Constitution bar the criminal prosecution of parents in the death of a child for failure to provide conventional medical care where the parents are members of an established fundamental church which teaches healing through prayer, anointing, and spiritual means?

2. When the application of statutes imposes criminal liability in an area of conduct otherwise protected by the First Amendment, must there be sufficient particularity to afford citizens notice as to what conduct is prohibited, and should the application of those statues in otherwise protected areas be considered void for vagueness?

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COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners respectfully ask that a Writ of Certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court dated January 14, 1988 denying Petitioners' Petition for Allowance of Appeal from the Superior Court of Pennsylvania, said order affirming the judgment of sentence of the Cambria County Court of Common Pleas, Criminal Division.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is a Per Curiam decision which is reproduced in Appendix A hereto. (The Pennsylvania citation and Atlantic citation are not available to the Petitioner at this time.) The opinion of the Superior Court of Pennsylvania is reported in *Commonwealth v, Barnhart* 345 Pa. Super. 10, 497 A.2d 616 (1985) and is printed in Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (Appendix A) was entered of January 14, 1988. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS: Statutes involved

This case involves the following: the free exercise clause of the First Amendment of the United States Constitution and two Pennsylvania criminal statutes, Involuntary Manslaughter and Endangering the Welfare of a Child as set forth below and reprinted in the Appendix:

1. United States Constitution, Amendment I.
2. 18 Pa. C. S. A. Section 2504 (a).
3. 18 Pa. C. S. A. Section 4304.

STATEMENT OF THE CASE

Two criminal charges were filed against each parent of Justin Barnhart, age 2½, who died as a result of a Wilm's tumor after a brief illness. Trial was held beginning March 9, 1983, concluding on March 16, 1983 when the jury returned guilty verdicts of Involuntary Manslaughter and Endangering the Welfare of a Child against both Defendants. Motion for New Trial and in Arrest of Judgment was denied and judgment was affirmed by the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal filed by the parents.

The Petitioners, William and Linda Barnhart are the parents of several children, one of whom, Justin, died September 10, 1981 of a Wilm's tumor at the age of 2½ years after a short illness of less than six months. Both Petitioners, as well as their children, are lifelong members of Faith Tabernacle Congregation, a fundamentalist denomination which maintains three churches and congregations in the tri-county area of Cambria, Blair and Somerset Counties, in southwestern Pennsylvania. The particular congregation to which Petitioners, their parents and grandpar-

ents before them, had belonged, had existed for more than sixty years in the community of Beaver Valley, Cambria County, Pennsylvania. Other member churches are found in Eastern Pennsylvania and New Jersey.

Petitioners' church has established its own parochial school system which provided their formal education. One of the basic precepts or tenets of Faith Tabernacle Congregation is a complete reliance in God, through the practice of faith and prayer, to heal body infirmities and illnesses, to the exclusion of the medical profession. This teaching is founded in and dictated by Biblical scriptures which are accepted and practiced literally by the Petitioners and thousands of other members of the denomination in Pennsylvania as well as other states and countries.

Healing, as known and practiced by Faith Tabernacle Congregation (and by these Petitioners all their lives) results from anointing the affected part(s) of the body with oil by the minister, often referred to as the Chief Elder, and prayer for God's healing hand to restore health and strength to the sick person.

Neither Petitioner, nor their children, have ever been to a hospital or been treated by a doctor. Their births all occurred at home without medical assistance. For a number of years the Petitioners have been going to a local dentist for treatment but without benefit of any novocaine or anesthetic injection. The doctrine of their religion distinguishes between medical and dental treatment, accepting the latter to some degree. At the same time, the Church does not admonish, purge, punish or otherwise discipline any member who seeks medical help or who uses medicine and drugs for treatment. Rather, the Church views such a departure as evidence of lack of faith and would encourage the wayward member to pray harder so as to strengthen his or her belief.

In the late Spring or early Summer of 1981, one or both of the Petitioners detected a small lump in the abdomen of their youngest child, Justin. Over the summer months, it grew in size and in the period of four to six weeks before his death on September 10th, Justin's abdomen became quite large and distended; he began to lose considerable weight in the rest of his body, yet he maintained an appetite, eating less but more often right up until his death. Prior to the last days of his illness, the

youth did not appear to be in any great distress and gave little or no evidence of pain at any time according to testimony from those who saw him in the final weeks of his life.

Soon after the initial discovery of Justin's lump, the pastor of the Beaver Valley Faith Tabernacle Congregation was requested by the Petitions to anoint Justin, and this was administered in the church, together with prayers being offered then and afterward periodically throughout the denomination for his recovery. Again, several days before his death, Justin was anointed, this time at home, by Pastor Nixon, accompanied by prayer. Shortly thereafter the child died quietly at home in the presence of his adult step brother, William Barnhart, Jr. Throughout this period, the Petitioners did nothing actively to conceal their son's illness nor to seek medical treatment.

The undertaker contacted the Coroner who ordered an autopsy. Dr. Sidney Goldblatt, local pathologist, performed the autopsy and attributed the death to the mechanism of starvation produced by the very large tumorous growth in Justin's abdomen. The tumor weighed nearly five pounds and measured 21 inches in circumference. Its presence in the child's abdomen crowded the other organs of the trunk to a large degree and contributed to the great weight loss.

There was never any medical advice or treatment sought by the Petitioners nor offered or given them by any medical person. The authorities first became aware of the situation following Justin's death. Cambria County Children & Youth Services conducted an investigation but did not file abuse charges because Justin was in good faith being furnished treatment by spiritual means through prayer and anointing alone in accordance with the tenets and practices of a religious denomination by a duly accredited practitioner.

A Coroner's inquest recommended further proceedings and charges of INVOLUNTARY MANSLAUGHTER and ENDANGERING THE WELFARE OF A CHILD were filed against both parents. The Coroner, police investigator, pathologist, and medical expert on Wilm's tumors testified for the prosecution. The petitioner-father, his son, brother, pastor, employer, neighbor and an expert witness in the field of theology testified for the defense.

At the trial the pathologist testified fully as to his findings, the emaciated condition of the deceased and the cause of death. Dr. Guilio D'Angio, a highly qualified and experienced doctor and professor, testified at considerable length regarding the results of studies performed in Wilm's tumor patients according to a national survey. His testimony indicated that the incidence of survival in Wilm's tumor cases in children today is quite high and that in Justin's case, had he been afforded treatment in the early stages, might have been high. Because the cancer had metastasized at some undeterminable point in time into the boy's lungs, Justin's chances for survival with conventional modern medical treatment such as surgery, radiation, and chemotherapy, would have been as little as 20% immediately prior to his death, in his opinion. Dr. D'Angio testified, on cross examination, that if Justin's cancer had metastasized early, as happens in 25% of the cases, then the boy's chances of survival would have been only 50% at best even with early diagnosis and treatment.

The relevant and important facts in this case are not disputed. A number of the witnesses called by the Petitioners were also used by the Commonwealth. The credibility of the Petitioners, and the medical and religious expert witnesses, was never in issue. The testimony presented by both sides in this case explained exactly what had happened, why from a medical standpoint it had happened, how from a theological standpoint faith healing does occur, and how it was that the Petitioners did what they did under the circumstances with which they were faced.

REASONS FOR GRANTING A WRIT OF CERTIORI

A. Void for Vagueness Doctrine.

The application of two criminal statutes in the case to punish conduct otherwise within the realm of First Amendment protection is unconstitutional in that the legislature must specifically define the prohibited conduct in an otherwise protected area. A lack of specificity in this area should render the application of the subject statutes facially void for vagueness. *Papachristou v. Jacksonville*, 405 U. S. 156 (1972).

The leading case in the area of vagueness of statutes and their applicability was in *U.S. v. Cohen Grocery Co.*, 255 U. S. 81

(1921), and a line of cases which followed and further defined the doctrine. The Court has stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process ..." See *Connally v. General Construction Co.* 269 U. S. 385, 391 (1926). The Court has gone on to hold what is the essence of the void-for-vagueness doctrine in the following:

> ". . . it will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. *Cline v. Frink Dairy Co.* 274 U.S. 445, 465 (1927)."

In the Pennsylvania Superior Court opinion in this case *Commonwealth v. Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), (See appendix), the Court noted: "Our decision today directly penalizes appellants' exercise of their religious beliefs. Appellants ask how we can hold them criminally liable for putting their faith in God. No easy answer attends." (345 Pa. Super. at 30, 497 A.2d at 627).

B. Free Exercise of Religion.

In *Reynolds v. United States* 98 U.S. 145 (1878) the Supreme Court first began to interpret the free exercise clause in order to determine whether the free exercise clause could be invoked to protect religiously motivated conduct that was otherwise criminal. The Court concluded that the free exercise clause protected only religious beliefs, and not actions motivated by those beliefs.

> "It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise (of religion), not that of their children that must determine Wisconsin's power to impose criminal penalties on the parent. *Wisconsin v. Yoder, supra.* 406 U.S. at 230."

In discussing the invocation of the free exercise clause of the First Amendment in this case, the Court noted that it is the essentially deep religious nature of the convictions which separates

this rejection of contemporary secular values from other philosophies which are not religious in nature, and therefore do not invoke the protection of the First Amendment. For these reasons, the Court points out that the personal and philosophical values of the like of Thoreau, or conscientious objectors not based on a religious foundation would not deserve the closer scrutiny afforded to religious freedom for many reasons going back to the birth of this nation and beyond.

C. Pennsylvania Law.

Pennsylvania's "Endangering the Welfare of a Child" Statue (18 Pa. C. S. A. Section 4304) has been challenged as being vague in the past, but under different circumstances. In *Commonwealth v. Mack* 467 Pa. 613, 359 A.2d 770 (1976), the Pennsylvania Supreme Court ruled that this statue was not vague because it did not meet the test of vaguenees found in *Papachristou v. Jacksonville, supra.* because it did not apply to conduct otherwise protected by the First Amendment.

> "If the statute contains no standard of conduct, or if the standard of conduct prohibits conduct which is protected by the First Amendment, the statue will be declared unconstitutionally "vague" without regard to the particular conduct of the individual challenging the statue (hereinafter known as "facial vaugeness.") *Commonwealth v. Mack* Id at 772. also see *U.S. v. Powell,* 423 U. S. 87 (1975)."

There is no argument that the law is clear regarding the intervention of the State, despite religious objection of the parents in cases "where the children's lives were in imminent danger." *In Re Green,* 448 Pa. 338, 292 A.2d 387 (1972). There is a balancing between the necessity of the State's interests and "the abridgement of a parent's right to freely practice his or her religion when those beliefs preclude medical treatment of a son or daughter." *In Re Green, supra. at 390.* This balancing approach is also evident in the Pennsylvania Superior Court's analysis in *Morris v. Morris,* 271 Pa. Super. 197, 412 A.2d 139, (1979).

> "We begin with the fundamental premise that our citizens have been constitutionally guaranteed the right to hold any religious belief without interference from the state. U.S. Constitutional Amendment I. Coupled

> with the fact that parents have traditionally been considered to have the primary, or natural, right to control their children's nurture. See *Prince v. Massachusetts* 321 U.S. 158 (1944); *Pierce v. Society of Sisters* 268 U.S. 510 (1925); *Meyer v. Nebraska* 161 U.S. 390 (1923). There has been erected a rampart of privacy about a child's spiritual development as formulated by his parents. See *Pfeffer, Religion in the Upbringing of Children* 35 Boston U. Law Review 333 (1965)."

The Court then goes on to state that while the belief is absolutely protected, the right to act on it is qualified. The point is that the Court recognizes that we are dealing with an area of conduct protected by the First Amendment despite being sometimes qualified or balanced, First Amendment freedoms nonetheless.

Therefore, what makes the Petitioners' case different from the *Commonwealth v. Mack, supra* case is that their activities in this religious area would ordinarily be protected by the First Amendment. Therefore these statutes do not meet the "vagueness" test of *Mack, supra.* or *Papachristou, supra.* because of the involvement of First Amendment freedoms which were missing from the *Mack* case.

D. Cases in Other States.

There have been very few cases available with the same set of facts as the Petitioners' case, as most others can be roughly broken down into two catagories:

1. Cases where medical treatment was compelled despite religious objection in life threatening cases, but which did not involve criminal prosecutions after the fact; or

2. Cases which involved criminal prosecutions after the fact, but which did not involve religious principles in performance or non-performance of acts.

A thorough discussion of the Petitioners' case, *Commonwealth v. Barnhart, supra.*, as well as related cases in other states can be found in 90 Dickinson Law Review 861, (1986). It was the conclusion of the author that in the *Barnhart* decision, the Pennsylvania Superior Court became the first appellate court in the United States to affirm an involuntary manslaughter conviction of a parent under these circumstances.

The New York Court of Appeals in *People v. Pierson* 176 N.Y. 201, 68 N.E. 243 (1903) dealt with a similar set of facts to the Petitioners' case, and that Court upheld the conviction of a defendant for violating a section of the New York Penal code which provided that willfully omitting, without lawful excuse, to furnish medical care to a minor was a misdemeanor. We submit that this case was decided before the long line of Supreme Court cases already cited herein which have expanded and defined our freedoms under the First Amendment.

In *Owens v. State* 6 Okla. Crim. 110, 116 P. 345 (1911), the Oklahoma Court followed the rational of the *Pierson* decision. Both of these cases involved criminal neglect laws, not involuntary manslaughter.

In *State v. Chenowith* 163 Ind. 94, 71 N.E. 197 (1904), the Supreme Court of Indiana stated in dicta that given the facts of the case, religious belief would be no defense to a prosecution for Manslaughter. This case involved the death of an eight month old child who was not treated by a physician, but rather by an elder of the church. The defendant was acquitted because of a procedural error at the trial court level.

In *State v. Stanford* 99 Me. 441, 59 A. 597 (1905), the Supreme Court of Maine reversed a conviction for manslaughter for causing the death of a member of the defendant's religious sect. The Court indicated in dicta that if the defendant did not believe that scientific methods could cure the sick, but believed in another recognized method, and pursued that method, there could be no neglect.

In *Bradley v. State* 79 Fla. 651, 84 So. 677 (1920), the defendant parent delayed treating a burned child through conventional medical treatment for five weeks because of religious beliefs. The child ultimately died and medical experts testified that if she had received medical treatment promptly she would have recovered. The Court reversed the defendant's conviction for manslaughter finding a lack of causation in the failure of the father to act and the resultant death.

In *Craig v. State* 220 Md. 590, 155 A.2d 684 (1959), the parents of a child who died of pneumonia were convicted of involuntary manslaughter for failure to provide medical care. The defendants were members of a fundamental sect who believed in divine

healing. The Court ruled that the state had not proved that the defendants' omission was the proximate cause of the child's death, and reversed the convictions.

In *People v. Arnold* 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967), the California Supreme Court ruled that a mother's treatment of a child with prayer was not a substitute for the type of care set forth under the state's child care statute, but reversed the conviction because of a procedural error.

E. Conflicts in Pennsylvania Law.

The Petitioners submit to this Honorable Court that it is particularly difficult to understand the prosecution of the Petitioners under Pennsylvania's Criminal Statutes when Pennsylvania law has to a certain extent recognized the validity of the parents' right to seek alternatives to conventional medical treatment. Pennsylvania's Child Protective Services Law, 11 Pa. Cons. Stat. Ann. Sections 2201-2224, in its definition of abused child omits from that definition children who are:

> "in good faith being furnished treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof or is not provided specific medical treatment in the practice of religious beliefs" . . . . Id. at section 2203.

It seems that the application of law is contradictory in Pennsylvania when the above stated recognition of certain parental rights under the First Amendment is found in one part of the law, however, those same parents are prosecuted under two sections of Pennsylvania's criminal code. The Petitioners submit that the application of these criminal statutes, particularly in light of this other recognition of the validity of their actions is at the least contradictory and confusing, and more importantly, unconstitutional. We submit that they are unconstitutional as infringing upon the free exercise of religion and unconstitutional as lacking in specificity as to what conduct is prohibited in otherwise protected areas.

As we cited earlier from the opinion of the Pennsylvania Superior Court, *Commonwealth v. Barnhart,* 345 Pa. Super. 10, 497 A.2d 616 (1985), (See appendix),

> "Our decision today directly penalizes appellants' exercise of their religious beliefs. Appellants ask how we can hold them criminally liable for putting their faith in God. No easy answer attends." (345 Pa. Super. at 30, 497 A.2d at 627).

Obviously reasonable and learned men have difficulty determining the applicability of the subject criminal statutes to the instant case; therefore, how can we now hold the Petitioners criminally liable for putting their faith in God with the reasonable expectation that the First Admendment would protect them?

F. Conclusion.

For the reasons stated herein, the Petitioners contend that by refusing to grant the Petition for Allowance of Appeal in the Pennsylvania Supreme Court, that Court upheld the Superior Court's decision which conflicts with the a number of U. S. Supreme Court cases as cited in this Petition.

Further, this case raises important issues which this Honorable Court should decide. A significant number of Americans adhere to the religious principles of the Petitioners, and they, along with the Petitioners look to this Court for guidance. We conclude that the Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Bruce F. McKenrick

Bruce F. McKenrick
Attorney for Petitioners

STATE OF PENNSYLVANIA:
: ss
COUNTY OF CAMBRIA :

AFFIDAVIT

I, Bruce F. McKenrick, Attorney for Petitioners in the above captioned matter, being duly sworn according to law, do hereby depose and say that I am a member in good standing of the Bar of the United States Supreme Court, having been admitted to practice on March 7, 1988; further that three true and correct copies of this Petition and Appendices were personally served upon the following counsel of record on March 14, 1988;

Assistant District Attorney for Cambria County
Patrick Kiniry, Esq.
Court House
Ebensburg, Pa. 15931

I do further certify that an origional and forty copies of this Petition and accompanying Appendices were mailed by regular first class mail on March 14, 1988 addressed as follows:

Clerk of the United States Supreme Court
1 First Street, N.E.,
Washington, D.C. 20543.

/s/ Bruce F. McKenrick

Bruce F. McKenrick
Attorney for Petitioners

Sworn to and subscribed
before me this 14th day
of March, 1988

/s/ Michael S. Tsikalas

Michael S. Tsikalas
Prothonotary of Cambria County

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM G. BARNHART AND LINDA BARNHART,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Bruce F. McKenrick
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APPENDIX "A"

The Supreme Court of Pennsylvania
Western District

Prothonotary

IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
Pittsburgh, PA 15219
(412) 565-2816

January 14, 1988

Fremont J. McKenrick, Esquire
Bruce F. McKenrick, Esquire
McKENRICK & McKENRICK
109 South Center Street
Ebensburg, PA 15931

In Re: Commonwealth of Pennsylvania v. William G. Barnhart
and Linda Barnhart
No. 611 W.D. Allocatur Docket 1985

Gentlemen:

The Court has enterd the following Order on your Petition for Allowance of Appeal in the above-captioned matter;

"January 14, 1988
Petition denied
Per Curiam"

Very truly yours,

/s/ Irma T. Gardner

Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Timothy Creany, Esq.
District Attorney
Honorable H. Clifton McWilliams
President Judge

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

APPENDIX "B"

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM G. BARNHART and LINDA BARNHART,

Appellants

No. 979 Pittsburgh, 1983

ORDER

AND NOW, this 16th day of AUGUST, 1985, it is ordered as follows:

_____ Order affirmed.

_____ Order reversed.

_____ Judgment affirmed.

_x_ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

/s/ Eleanor R. Valecko

Eleanor R. Valecko
Deputy Prothonotary

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

V.

WILLIAM G. BARNHART and LINDA BARNHART,
Appellants

No. 979, Pittsburgh, 1983

Appeal from the Judgment of Sentence June 29, 1983 in the Court of Common Pleas of Cambria County, Criminal No. 0424 and 0425, 1982.

BEFORE: OLSZEWSKI, HESTER, and SHIOMOS, * JJ.

OPINION BY OLSZEWSKI, J.: FILED: AUGUST 16, 1985

This matter comes before us on appeal from judgment of sentence for involuntary manslaughter[1] and endangering the welfare of a child.[2] Appellants' convictions follow the death of their infant son. The child, Justin Barnhart, age 2 years and 7 months, died as a result of an untreated Wilms' tumor. Appellants, life-long members of the Faith Tabernacle Church, had relied on God to the exclusion of modern medicine to cure the boy's cancer. Justin's death sparked an inquiry. As a result of that investigation, appellants were tried and convicted by a jury on counts of involuntary manslaughter and endangering the welfare of a child. Their post-verdict motions denied, appellants received terms of probation. They now appeal.

Appellants raise five points of error. The first squarely frames the conflict in this case: the competing interests of parent and state in a child's life.

***Judge Thomas N. Shiomos, Senior Judge, of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.**

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1. 18 Pa.C.S. Sec. 2504.
2. 18 Pa.C.S. Sec. 4304.

I

Appellants argue that the criminal statutes were unconstitutionally applied to punish conduct protected by the free exercise clause of the First Amendment. At issue was appellants' failure, for religious reasons, to seek medical treatment for their child. The statutes provide:

> **Endangering welfare of children**
> A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S. Sec. 4304, and:

> **Involuntary manslaughter**
> A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, he causes the death of another person.

18 Pa.C.S. Sec. 2504(a). Against these statutory proscriptions, appellants assert a claim of religious right. They contend their conduct as parents raising children within a particular religious order, by the principles and tenets of that order, is protected by the First Amendment. *See* U.S. Const. Amend I. Conceding that the state may lawfully abridge their religious freedom, appellants argue that the state has failed to define with specificity what conduct, otherwise protected, is forbidden by Sections 4304 and 2504(a). "When the Commonwealth acts to limit this basic freedom, it must do so in clear and unambiguous terms so that potential Appellants know what conduct is proscribed." Appellants' Brief at 15.

Section 4304 speaks of a "duty of care."[3] The Crimes Code nowhere defines this duty. The Commonwealth, in response to

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3. Appellants direct their challenge toward the child welfare statute, 18 Pa.C.S. Sec. 4304.A proven violation of Section 4304 would establish the "unlawful act" necessary under Section 2504, the involuntary manslaughter statute. 18 Pa.C.S. Sec. 2504.

appellants' request for "the specific law which imposes the duty of care which is alleged to have been violated by the Defendants," stated:

> "The duty to render care for one's child arises out of the relationship of parent and child. The right to receive medical care is one created by natural law, attributable to the nature of mankind rather than to enactments of law. Various statutes of the Commonwealth of Pennsylvania impliedly recognize this natural right and corresponding duty by providing for remedies to ensure the welfare of children whose parents fail to provide reasonable medical care necessary for the child's health."

Although the Commonwealth failed to elaborate, ample authority exists for its proposition. A parent is charged with the duty of care and control, subsistence and education necessary for the child's physical, mental and emotional health and morals. *See*42 Pa.C.S. Sec. 6302 (defining "dependent child"). At the very least, he or she must act to avert the child's untimely death. *See Commonwealth v. Breth,* 42 Pa.C.56 (Clearfield Co. 1915); *Commonwealth v. Hoffman,*29 Pa.C. 65 (Blair Co. 1903) (parent found guilty of involuntary manslaughter for failure to seek medical assistance for sick child); *see also Commonwealth v. Howard,* 265 Pa.Super. 535, 538, 402 A.2d 674 676 (1979) ("A parent has the legal duty to protect her child, and the discharge of this duty requires affirmative performance."). "The inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself, supports imposition of such a duty upon the parent." *Commonwealth v. Konz, 498 Pa. 639, 644, 450 A.2d 638, 641 (1982) (explaining Breth* and *Hoffman*).

Appellants' vagueness challenge rests ultimately on the procedural due process requirement of notice. Due process requires a minimum degree of definiteness in the statutory prescription of standards, language which conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge,* 341 U.S. 223, 231-232 (1951). Appellants were charged with consciously disregarding "a substantial and unjustifiable risk that death would

result after observing the presence and continous growth of a tumor in the stomach of Justin Barnhart which caused a continous weight loss and which ultimately resulted in Justin Barnhart's death by starvation." At the coroner's inquest, appellant William G. Barnhart testified that he and his wife were aware of his son's condition: "Well we realized he was going downhill and in his body--our little neighbor boy, Scotty Gates, died with leukemia and Justin seemed like he fell that same rut in that short time and it took a lot of faith to keep looking up." William G. Barnhart's inquest testimony would indicate appellants knew Justin's death was imminent. Little remains, therefore, of appellants' "no-notice" claim.[4]

What does remain is troublesome. Our decision today directly penalizes appellants' exercise of their religious beliefs. Appellants ask how we can hold them criminally liable for putting their faith in God. No easy answer attends. A central tenet of appellants' faith is that life rests ultimately in God's hands. Three generations

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4. Further, as our Supreme Court has explained, it must be borne in mind that we are dealing with a juvenile statute:

> The purpose of juvenile statutes, as the one at issue here, is basically protective in nature. Consequently, these statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be circumscribed, these statutes are necessarily drawn broadly. It clearly would be impossible to enumerate every particular type of adult contact against which society wants its children protected. We have therefore sanctioned statutes pertaining to juveniles which proscribe conduct producing or tending to produce a certain result ... rather than itemizing every undesirable type of conduct.
>
> The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.

Commonwealth v. Mack, 467 Pa. 613, 617-618, 359 A.2d 770, 772 (1976) (upholding, as against a "vagueness" challenge, Section 4304, Endangering Welfare of Children) (citations omitted).

of appellants' family have adhered to that belief.[5] As Pastor Charles Wallace Nixon explained, more than concern for the child's physical well-being, the church's "greater concern" was for the child's spiritual interest or eternal interest:

> "Well, the only greater concern would have been his spiritual interest or eternal interest.
>
> It has been stated by our presiding elder, by Pastor Reinert, he said, "that the courts and people would not possibly as a whole accept a statement like that, but it has been said that that is an abuse or child abuse or in other words harmful to the child." We would consider going to a doctor and trusting in medicine doing greater harm because it would be harmful as we believe in our belief, it would be harming the spiritual and eternal interest of the child and the parents as well in doing so."

Accepting as true these statements of appellants' religious beliefs, the question becomes one of degree: to what extent may a parent impose these beliefs on a minor child?

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5. Appellant William G. Barnhart testified that he, his four sisters and one brother had been born at home without medical care.

Both his mother and his father had belonged to the Faith Tabernacle Congregation. Appellant's father had come into the church when he (the father) was severely ill. On repenting of his sins and being anointed, the father recovered from his illness and returned to work in the mines. Appellant testified that his father had lived to be in his sixties.

Because of his religious beliefs, appellant served without pay in World War II. He received an honorable discharge.

Appellant has visited a doctor only for employment physicals. His children have never received medical treatment.

Appellant has two children by his current marriage and two by a former marriage. The children of the first marriage, now full-grown, are both practicing members of the Faith Tabernacle Church. Appellant testified that his son by the first marriage:

> Bill, when he was about five years old, had a severe sick spell, lost all his hair, his eyebrows. I don't know what the disease was. He was practically yellow. We had him anointed and it was--I don't know if it was overnight or the next day he started to recover and he received all his hair back, his color and that is him sitting there now.

The son Bill testified at trial.

Appellants' right to hold and to practice their religious beliefs free from governmental interference is guaranteed by the free exercise clause of the First Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, and by Article I, Section 3 of the Pennsylvania Constitution. Appellants' right to raise their child by these beliefs follows from the guarantee of religious freedom and the state's traditional deference to the parents' authority over their child. *See In re Green,* 448 Pa. 338, 292 A.2d 387 (1972) (unless the child's life is immediately imperiled, the state's interest must give way to the parent's religious beliefs precluding medical treatment); *see also Bellotti v. Baird,* 443 U.S. 622, 639 n. 18 (1979)(suggesting there exists a constitutional parental right against undue, adverse interference by the state). Appellants' exercise of these rights has brought them in conflict with other established law. An examination of the bases of these rights makes clear that the conflict was all but inevitable.

The guarantee of freedom of religion is intended to secure the rights of the individual as against the state. Underlying the guarantee is a principle of neutrality, a belief that religion is "not within the cognizance of civil government." *Reynolds v. United States,* 98 U.S. 145, 163 (1878). However nice the distinction in theory, as the case at bar attests it sometimes fails in practice.

Assertion of a claim of religious right does not vouchsafe the parents secure from state influence in every aspect of their children's lives. As the United States Supreme Court in *Prince v. Massachusetts,* 321 U.S. 158 (1944), explained:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the society can neither supply nor hinder. and it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
>
> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general

> interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death."

Id. at 166-167 (citations omitted). For its last proposition, the Court cites the case of *People v. Pierson,* 176 N.Y. 201, 68 N.E. 243 (1903).

The question whether a parent may be held criminally liable when the exercise of his or her religion results in the child's death is one of first impression for our appellate courts. The court in *Green,* concluding that the child's life was not in immediate physical peril, did not reach that question. 448 Pa. at 345, 292 A.2d at 392.[6] Neither this Court nor our Supreme Court have addressed the issue on the merits. *See Commonwealth v. Konz,* 498 Pa. at 644, 450 A.2d at 641 (dicta); *Commonwealth v. Comber,* 170 Pa.Super. 466, 469, 87 A.2d 90, 93 (1952) (dicta), rev'd on other grounds, 374 Pa. 570, 97 A.2d 343 (1953). Of the pair of lower court cases which have grappled with the issue, one attempted to dissolve the dilemma, *Commonwealth v. Breth,* 44 Pa.C. 56 (Clearfield Co. 1915), while the other rode roughshod through it, *Commonwealth v. Hoffman,* 29 Pa.C. 65 (Butler Co. 1903).

In *Hoffman,* a child died of scarlet fever after his father called in the elders of a Christian Scientist Church rather than a physician who was near and available. Framing the issue as a

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6. *Green* involved a suit for judicial declaration that the minor was a "neglected child" under 11 P.S. Sec.243. The statute defined "neglected child" as "a child whose parent...neglects or refuses to provide proper or necessary...medical or surgical care." Section 243 was repealed in 1972. The current statute is silent on this point.

question of reasonableness, the court asked the jury to determine whether an ordinarily prudent man would have relied on these remedies alone. The court answered defendant's claim of religious right with its own reading of the scriptures:

> "And we may well believe that the demands of ordinary prudence do not run counter to divine authority, for the same inspired writer, whose injunctions the defendant has sought so literally and conscientiously to observe, informs us that 'as the body, without the spirit, is dead, so faith without works is dead also.' "

Id. at 69. In the case at bar, appellant testified that: "In my belief I know no other way but the way I pointed out to live and if I would go to a doctor I would be turning my back on my faith." The First Amendment precludes scrutiny of the verity or validity of religious beliefs. *See United States v. Ballard,* 322 U.S. 78 (1944). Adoption of the *Hoffman* approach would entail our pitting one set of beliefs against another. Such a course would clearly violate the spirit of neutrality. We decline, therefore, to follow the *Hoffman* approach.

The *Breth* decision presents its own set of problems. There a father failed, apparently for religious reasons, to furnish medical attendance and proper medicines for his critically ill son. The child died. The parent was prosecuted for manslaughter. The trial court charged the jury:

> "It would not be a lawful excuse for the nonperformance of this duty that he entertained some religious or conscientious belief that it was unnecessary or that he had no intent to do anything which would interfere with the recovery of the child nor that he was honestly mistaken as to the efficacy of the means which he did use. As a citizen of this commonwealth and the parent of this dependent child, the law of Pennsylvania, so long as he remains within its borders, puts upon him the duty of doing those things for its protection which the ordinary judgment of prudent men at the time and place would dictate, and his failure so to do would be negligence, and if the circumstances

> indicated that the child's condition required great care, his failure to provide the means ordinarily used by prudent men and at his disposal would be gross or culpable negligence."

44 Pa.C. at 66. So doing, the court focused on the parent's civil duty to the exclusion of any religious concerns.

The court in *Breth* simply assumed that civil law took precedence over religious convictions. As the United States Supreme Court decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), makes clear, that assumption does not always hold. The civil law may, at times, give way to religious beliefs. At issue in *Yoder* was a claim by members of the Old Order Amish religion and the Conservative Amish Mennonite Church that application to them of a state compulsory school-attendance law violated their rights under the free exercise clause. In sustaining the Amish claim, Mr. Chief Justice Burger for the majority reasoned that the state's interest in universal compulsory education was outweighed by the harm enforcement of the law would cause the Amish in the free exercise of their religion:

> "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable. For the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

406 U.S. at 218 (citations omitted). The *Yoder* Court rejected the argument that the state as *parens patriae* has the power to extend the benefit of secondary education to children regardless of their parents' wishes. *Id.* at 229. The majority rested safe in its assurance that no harm to the child or to the public safety, peace, order, or welfare could be demonstrated or properly inferred. *Id.* at 230.

Mr. Justice Douglas, dissenting in part, argues that the case necessarily involved not only the free exercise claims of the parents but also those of the high-school-age children:

> These children are "persons" within the meaning of the Bill of Rights. We have held so over and over again. In *Haley v. Ohio*, 332 U.S. 596, we extended the protec-

> tion of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault*, 387 U.S. 1, 13, we held that " neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship*, 397 U.S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards....

Id. at 243 (citations corrected). Chief among these safeguards for Douglas was the child's right to be heard.

Although his life hung in the balance, Justin Barnhart here had no voice in his parents' decision to rely on religious rather than medical help. Precisely because a child of two years and seven months cannot speak on his own behalf, the state has charged the parents with the affirmative duty of providing medical care to protect that child's life. Faced with a condition which threatened their child's life, the parents had no choice but to seek medical help.

We recognize that our decision today directly penalizes appellants in the practice of their religion. We emphasize that the liability attaches not to appellants' decisions for themselves but rather to their decision effectively to forfeit their child's life. *Accord Prince v. Massachusetts*, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they (the children) have reached the age of full and legal discretion when they can make that choice for themselves."). Admittedly, the distinction is not a happy one. An integral part of family life is the transmission of values from one generation to the next. In the case at bar, the values include a set of religious beliefs. Sitting as a court of law, we abjure even the suggestion that, by our decision today, we are passing on the content of those beliefs.

II

Appellants next challenge, as against the weight of the evidence, the jury verdicts.[7] Specifically they allege that the

7. Although appellants filed a boilerplate post-verdict motion challenging the weight of the evidence, the motion pre-dated this Court's decision in *Commonwealth v. Holmes*, 315 Pa.Super. 256, 461 A.2d 1268 (1983). We deem the issue preserved for review. *See* Pa.R.Crim.P., Rule 1123(a), 42 Pa.C.S.A..

Commonwealth has failed to prove beyond a reasonable doubt that Justin's death resulted from their reliance on prayer.

It is undisputed that the cause of Justin's death was an untreated Wilms' tumor. However, as the trial judge counseled the jury, Justin's death may have had more than one direct cause. Appellants were convicted on the theory that their failure to seek medical care directly caused the child's death. They raise a legal question whether the child might not have died in any event.

The Commonwealth's case rested on circumstantial evidence. Medical care first reached the boy after his death. On the basis of a posthumous examination, Dr. Sidney A. Goldblatt testified that the cause of Justin Barnhart's death was "Wilms' tumor, also known as nephroblastoma, a tumor originating in the left kidney and mestastasizing to the right and left lungs and to the lymph nodes, mediastinal and para-aortic area."[8]

Dr. Giulio J. D'Angio, Director of the Children's Cancer Research Center of the Children's Hospital of Philadelphia, testified that he had analyzed slides taken from the boy's tissue. On the basis of those slides and the autopsy report, Dr. D'Angio concluded that the tumor had a favorable histology. He explained that the boy's chances for survival at any stage would have depended on whether the tumor had spread to the lungs. Had medical treatment been afforded:

> His (Justin's) overall chance for survival with a favorable histology lesion, without knowing what state disease he had had at that time would have been 90 percent. Had he been in the early state; that is, without their being spread, it would have been about 95 percent

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8. Dr. Goldblatt explained:

"In describing the cause of death, it is reasonable to talk of the cause of death and the mechanisn of death.

The mechanism of Justin's death is emaciation or in the broadest sense a kind of malnutrition in that the tumor has tremendous metabolic demands. It was indeed the largest single structure in Justin's body and it has a tremendous demand for nourishment, for food, and at the same time, the tumor, by crowding and compressing and obstructing the intestines prevented Justin from taking nourishment in adequate amount and so the mechanism of death is this form of wasting or malnutrition, if you will, resulting in the extreme emaciation I described."

> at least. If it had been only locally spread, it would have been 85 percent. And had he had metastatic disease, it would have been 50 percent. By metastatic disease I mean spread to the lungs.

In response to defense counsel's question, Dr. Goldblatt agreed that there was no way of knowing when metastasis to the lungs had occurred.

The jury had before it certain facts. Justin Barnhart had died from a kidney tumor with extensive pulmonary involvement. The boy's mother had first noticed the growth in April. By September, the boy was dying. After his death, it was impossible to determine at what stage the cancer had spread to the lungs. If the tumor had been detected and treated before the cancer spread, Justin's chances of survival would have been at least 95 percent. If, on the other hand, the cancer had already metastasized by May, Justin's chances with any treatment were only 50-50. Appellants argue that the facts as given were insufficient to sustain the manslaughter verdicts.

The test for sufficiency of the evidence asks whether, viewing the evidence in the light most favorable to the Commonwealth and drawing all proper inferences favorable to the Commonwealth, the trier of fact could reasonably have been determined that all elements of the crime had been established beyond a reasonable doubt. *Commonwealth v. Keblitis*, 500 Pa. 321, 456 A.2d 149 (1983). Applying that standard to the facts of this case, we are satisfied that Commonwealth has established beyond a reasonable doubt the offense of involuntary manslaughter.

Conviction for involuntary manslaughter requires proof that the death was "a direct result" of appellants' failure to seek medical treatment. *See* 18 Pa.C.S. Sec. 2504. Causation must be established beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970); *see also Commonwealth v. Hicks*, 466 Pa. 499, 353 A. 2d 803 (1976); *Commonwealth v. Stolzfus*, 462 Pa. 43, 337 A.2d 873 (1975); *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971). It is not sufficient that death *probably* resulted from the unlawful act. *Commonwealth v. Radford*, 428 Pa. 279, 236 A.2d 802 (1969). The Commonwealth must prove a *direct* causal relationship between the defendant's acts and the victim's death.

Tort concepts of "proximate cause" play no role in a prosecution for criminal homicide. *Commonwealth v. Root*, 403 Pa. 571, 170A.2d 310 (1961).

Appellants argue that the facts presented fail to establish causation beyond a reasonable doubt.[9] Depending whether or not the cancer had metastisized by the time it was discovered, Justin's chances could have been excellent or no better than even no matter what the treatment. Quantification of "proof beyond a reasonable doubt" is problematic. *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971). Had the Commonwealth established that Justin with medical treatment stood a 95% chance of survival, we would have little trouble affirming the manslaughter convictions. Conversely, had testimony indicated early pulmonary involvement with a survival rate of only 50% no matter what the treatment, we would pause. Reasonable doubt, after all, is one which would cause a person to hesitate to act in an important affair. *See* Jury Charge, footnote 10, *infra*. Resolving our doubt in favor of the Commonwealth, we reject appellants' claim.

III

Appellants raise numerous challenges to the jury charge. They argue that the charge was tantamount to a directed verdict of guilty, that it confused the jury, prejudiced appellants' case and misstated fundamental legal principles. After reviewing the charge in its entirety, we dismiss appellants' claims. The charge, though strongly worded, stated the law in the Commonwealth today.[10] The trial judge properly framed the question of fact:

> "Now, this case is really not a question of Christian Faith or the efficacy of prayer. It is whether the parents

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9. Both Dr. Goldblatt and Dr. D'Angia stated their opinions with a "reasonable degree of medical certainty." *See Commonwealth v. Webb*, 449 Pa. 490, 495, 296 A.2d 734, 737 (1972). "Medical causation and legal causation are qualitatively different in their application. Whether the Commonwealth's evidence is sufficient to warrant a finding of causal connection is initially a legal question for the court, but whether it is persuasive beyond a reasonable doubt is for the jury to say." *Id.* at 496, 296 A.2d at 737.

10. The court instructed the jury:

Now, the law is that whenever the law commands or prohibits the commission of any act, no person, parent can excuse their practices to the contrary because of their religious or conscientious conviction.

The Supreme Court of Pennsylvania and of the United States has stated that to permit this would be to make the professed doctrine of religious belief superior to the law of the land and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Our Superme Court has stated that it is impossible to see how civil government could exist if the dictates of the individual conscience were in every instance where they come in conflict with the law of the land, the paramount rule of action and it has been layed down by the Supreme Court from an early date where the law is dispensed with, whenever they happen to be in collision with some supposed religious obligation, Governments would be perpetually falling short of the exigence.

There are a few things, however simple, that stand indifferent in the view of all the sects into which the Christian world is divided. There are people who believe that the divine power may be invoked to heal the sick and that faith is all that is required.

There are others who believe that the Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance including the restoration and preservation of his health and that he is left to work out his own salvation under fixed natural laws.

There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; and that science is but an agent of the Almighty through which he accomplishes results and that science and Divine Power may be invoked together to restore diseased and suffering humanity.

But, sitting as a Court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs and have no power to determine which is correct.

We place no limitations upon the power of the mind over the body, the power of faith to dispel disease or the power of the Supreme Being to heal the sick.

We merely declare the law as given to us by the Legislature and the law as enumerated by the Courts. In fact, to permit any man to set up an alleged religious or conscientious belief to override the laws of the land would be to create an ecclesiastical authority which human experience has demonstrated to be the most oppressive tyranny under which mankind has ever groaned.

The charge made extensive use of the language in *Commonwealth v. Breth*, 44 Pa.C. 56 (1915). Although we question the reasoning in that case, no prejudicial error results from use of its language. *See Commonwealth v. Konz*, 498 Pa. 639, 450 A.2d 638 (1982) (citing both *Breth* and *Commonwealth v. Hoffman*, 29 Pa.C. 65 (1903)).

> of Justin failed to seek medical assistance for a seriously ill child and that failure caused his death."

The fact that the trial judge, in his charge, dismantled appellants' theory of religious defense does not invalidate the charge. *See Commonwealth v. Thompson*, 367 Pa. 102, 79 A.2d 401, cert. denied, 342 U.S. 835 (1951), cert. denied, 342 U.S. 929 (1952) (so long as instructions are not binding, no error for judge to express opinion in jury charge).

IV

Appellants next argue that the trial judge erred in refusing to charge the jury on culpability as per 18 Pa.C.S. Sec. 302.[11]

> "Appellants submitted the following points for charge:
> (3) The offense of Endangering the Welfare of a Child requires a specific intent so that the accused must be aware that his complete reliance on faith healing is of an endangering nature such as would bring harm to the child.
> (4) The offense of Endangering the Welfare of a Child requires a specific intent so that the accused must be aware if he persists in his conduct (faith healing beliefs) he is practically certain the the child will be endangered.
> (5) The offense of Endangering the Welfare of a Child requires a specific intent so that the accused must be aware that his complete reliance on faith healing is of an endangering nature such as would bring harm to the child.
> (6) If the jury finds that the defendants were operating under a mistaken belief as to the fact their prayers and

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11. Under Section 302 (b)(2):
A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist: and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

18 Pa.C.S. Sec. 302 (b)(2).

> anointing would heal their sick son, said ignorance and mistake being due to their background, then this ignorance and mistaken belief would negate the specific intent of "knowingly" endangering their child's welfare."

The trial judge charged the jury, in pertinent part:

> "Now, as to the matter of endangering the welfare of a child, very simply we state, the elements in that situation where a person has been charged with the crime of endangering the welfare of a child, in order to find a defendant guilty of the crime you would have to find each of the elements of the crime has been established beyond a reasonable doubt. What are those elements?
> First, that the defendants endangered the welfare of the child by violating a duty of care; that is, failure to seek medical attention when the circumstances demanded it, which is the law of Pennsylvania.
> Secondly, that the defendants endangered the welfare of the child knowingly; that is, a person's conduct is knowing when that person is aware that it is practically certain that their conduct; that is, the failure to obtain medical assistance will cause a particular result; that is, that the physical welfare of the child would be endangered; and,
> Third, that the defendants were, at the time, parents of Justin; and fourth, that Justin was under the age of 18 at the time of endangering."

Points 3, 4 and 5, explaining the concept of "knowingly" endangering the child's welfare, were covered in the jury charge. Additionally, a finding of specific intent is supported by Mr. Barnhart's testimony at the coroner's inquest. With respect to point 6, appellants have never claimed that mistake or ignorance caused them to rely on the power of prayer. To the contrary, appellants continue to believe that Justin's death, their prayers and his anointing notwithstanding, represents the will of God.

V

Finally, appellants argue that the trial court erroneously excluded testimony of a caseworker who investigated the matter after the child's death. Appellants attempted to introduce the testimony of Josephine Siciliano, a Child and Youth Services caseworker who had investigated appellants' home at the coroner's request. The trial court excluded the testimony: "The caseworker in question did not enter into the picture until well after the death of the child and after the fact. Further, the Defendants at no time were charged with abuse." Admission or exclusion of evidence lies within the sound discretion of the trial judge. We find no error in the lower court's decision.

Further, appellants' attempted reliance on the Child Protective Services Law, 11 P.S. Sec. 2201 *et seq* is misplaced. For the purposes of reporting suspected child abuse, the Law does specifically exclude cases where the child:

> "...is in good faith being furnished treatment by spiritual means through prayer alone in accordance with the tenet and practices of a recognized church or religious denomination by a duly accredited practitioner thereof or is not provided specified medical treatment in the practice of religious beliefs...."

11P.S. Sec. 2203. Failure to report, however, is not at issue here.

VI

Appellants have failed to challenge the legality of their sentences. A question as to the legality of a sentence is, however, never waived. *Commonwealth v. Ford*, 315 Pa. Super. 281, 461 A.2d 1281, 1288 (1983) (and cases cited therein). On the facts of this case, judgment of sentence for both involuntary manslaughter, and endangering the welfare of a child cannot stand. We vacate the sentences entered on the lesser charges.[12]

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12. The trial court sentenced appellant William G. Barnhart:

With regard to the matter of C-0425(a)-82, involuntary manslaughter, it would be the sentence of the Court:

1. The Defendant is to be placed on probation for a period of 59 months. The conditions of that probation are that he:

A. Pay the costs of prosecution.

B. Pay the amount of $250 to the use of Cambria County; that amount to be paid $50 each September 1st of each year beginning September 1, 1983.

C. The costs of prosecution are to be paid at the rate of $25 per month until the costs are paid in full, and that would begin July 29, 1983, and each month thereafter until paid in full.

D. The Defendant shall contribute 100 hours of community service in a hospital or recognized hospice center as one of this condition. This is to be done and credited to him within the year of 1983.

That would be the sentence of the Court on C-0425(a)-82.

With regard to the case of C-0425(b)-82, endangering the welfare of children...the sentence of the Court would be:

1. That he be placed on probation for a period of 23 months.
2. That he pay the costs of prosecution.
3. He is under the supervision of the Cambria County Probation Bureau in both C-0425 (a) and (b)
4. This sentence is to run concurrently with C-0425(a)-82.
5. Upon the payment of the costs as we have indicated with regard to C-0425(a)-82, those costs with regard to C-0425(b)-82 would be picked up on the 29th of the month after he has completed payment of the costs to C-0425(a)-82 and $25 each month thereafter until those costs are paid in full.

The court sentenced Linda Barnhart:

It would be the sentence of this Court to C-0424(a)-82, involuntary manslaughter charge, that she:

1. Pay the costs of prosecution.
2. Be placed under the supervision of the Cambria County Probation Bureau for a period of 23 months.

The condition of that probation would be just to pay the costs of prosecution and be placed under the supervision of the Cambria County Bureau of Probation for a period of the 23 months. And we will state later how those costs are to be paid.

With regard to C-0424(b)-82, endangering the welfare of the children, she is sentenced to:

1. Pay the costs of prosecution.
2. Be placed under the supervision of the Cambria County Probation Bureau for a period of 23 months to run concurrently with C-0424(a)-82.
3. Her costs are to be paid beginning the month following the completion of her husband's payments of costs at the rate of $25 per month and we are adhering and staying with the 29th of the month with regard to the initial starting date of the payment of those costs, after her husband has paid his costs, as we stated, in full, and so that her payment of costs will run consecutively to the payment of her husband's costs.

The court, in imposing concurrent sentences of probation, stated its recognition that the offenses might merge.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determind whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932), quoted in *Commonwealth v. Tarver*, 493 Pa. 320, 325, 426 A.2d 569, 572 (1981). This Court, in its most recent pronouncement on the subject, has prescribed a mechanical application of the *Blockburger* test. "The test depends solely on a comparison of the elements of the crimes charged, not on the similarity or even the identity of the evidence introduced at trial to establish their commission." *Commonwealth v. Williams*, No. 663 October, 1978, slip opinion at 6 (Pa. Super. July 9, 1985). Applying that test to the case at bar, we conclude that imposition of separate sentences for endangering the welfare of a child, 18 Pa.C.S. Sec. 4304, and involuntary manslaughter, 18 Pa.C.S. Sec. 2504, violated the constitutional bar against double jeopardy.

Section 2504 defines involuntary manslaughter as a death resulting from "the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner (where the actor) causes the death of another person." To the extent that liability under Sec. 2504 is predicated on commission of an "unlawful act," a proven violation of 18 Pa.C.S. Sec. 4304 would establish that unlawful act. Briefly stated, a violation of Sec. 4304 furnishes the misdemeanor for misdemeanor-manslaughter under Sec. 2504.

The proposition that proscriptions against double jeopardy bar punishment for both the misdemeanor and the misdemeanor-manslaughter is not a novel one. In *Commonwealth v. Tarver*, 493 Pa. 320, 426 A.2d 569 (1981), our Supreme Court held that, for purposes of double jeopardy, robbery is not a discrete offense from killing in the course of robbery. The bar against punishment for both the felony and the felony-murder has been explained by this Court:

> "in a felony-murder prosecution the underlying felony is a lesser-included offense of, and therefore the "same offense" as, the felony-murder itself, because proof of the felony-murder ipso facto proves all the elements of

> the underlying felony; indeed proof of the underlying felony is necessary to establish that a killing was in fact felony-murder."

Commonwealth v. Williams, slip opinion at 8 (citations omitted). That same logic attends here. Proof of the underlying unlawful act is necessary to establish involuntary manslaughter.[13]

The *Williams* court limited the use of the *Blockburger* "same offense" test by interpreting it as "a rule of statutory construction to be employed where the legislature has not explicitly authorized separate punishments for a single offense." Slip opinion at 9. A review of the statutory language at issue here makes clear that the legislature did not intend cumulative punishments for the same offense. Rather, the legislature devised distinct punishments dependent on the consequences of the "unlawful act." When the result of the unlawful act is merely to endanger the child's welfare, the offense is punishable as a misdemeanor of the second degree. 18 Pa.C.S. Sec. 4304. Where, however, the child's death results, the offense is typed as a misdemeanor of the first degree and the punishment is enhanced accordingly. 18 Pa.C.S. Sec. 2504(b); *see* 18 Pa.C.S. Sec. 1104.

The convictions for endangering the welfare of a child merge for purposes of sentencing with the convictions for involuntary manslaughter. We vacate the sentences for endangering the welfare of a child.

Judgment of sentence as modified affirmed.

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13. We note that the two sections require different findings of intent. Section 2504 specified that the unlawful act be done "in a reckless or grossly negligent manner." Section 4304 requires proof that the accused "knowingly" endangered the welfare of a child. A finding that the accused knowingly endangered the welfare of a child is sufficient to establish intent under Section 2504. 18 Pa.C.S. Sec. 302(e) ("When the law provides that negligence suffices to establish an element of the offense, such element is also established if a person acts intentionally or knowingly."); *see Commonwealth v. Thomas*, 482 Pa.Super. 312, 393 A.2d 1122 (1978) (applying Crimes Code definition of "negligently" to prosecution for involuntary manslaughter).

APPENDIX "C"

STATUTES:

United States Constitution, First Amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

INVOLUNTARY MANSLAUGHTER. 18 Pennsylvania Consolidated Statutes, section 2504.

(a) General rule. - A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

(b) Grading. - Involuntary manslaughter is a misdemeanor of the first degree.

ENDANGERING WELFARE OF CHILDREN. 18 Pennsylvania Consolidated Statutes, section 4304.

A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

APPENDIX "D"

IN THE COURT OF COMMON PLEAS
OF CAMBRIA COUNTY, PA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
vs.
WILLIAM G. BARNHART and LINDA BARNHART,
Defendants

Nos. C-0424, 0425-82

CHARGES: Involuntary Manslaughter; Endangering the Welfare of Children

BEFORE THE HONORABLE H. CLIFTON McWILLIAMS, JR., PRESIDENT JUDGE, OF THE FORTY-SEVENTH JUDICIAL DISTRICT, PENNSYLVANIA.

APPEARANCES:

For Commonwealth of Pennsylvania:
PATRICK T. KINIRY, ESQUIRE
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Ebensburg, Pennsylvania

For Defendant, William G. Barnhart:
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Ebensburg, Pennsylvania

For Defendant, Linda Barnhart;
BRUCE F. McKENRICK, ESQUIRE
109 S. Center Street
Ebensburg, Pennsylvania

ORDER

AND NOW, April 5, 1983, after full consideration, the Defendants' Motions for New Trial and Arrest of Judgement are denied.

BY THE COURT

/s/ H. Clifton McWilliams, Jr., P.J.

H. Clifton McWilliams, Jr., P.J.

DEFENDANTS' MOTIONS FOR NEW TRIAL AND ARREST OF JUDGEMENT

OPINION AND ORDER

The essential matters raised by the Defendants in their Motions for New Trial are as follows:

I. Defendants' contention: The Court erred in denying essential voir dire questions propounded by the Defendants (as to jurors' religious beliefs) and in refusing to permit a sequestered voir dire.

Inquiries as to a jurors' religious beliefs upon voir dire have usually been properly excluded by the Appellate Courts. Defendants in the instant case continually attempted to make the issue a religious issue, but the issue really was not a religious issue. (47 Am Jur 2d §283).

The basic issue was the legal duty of a parent to seek medical assistance for a child when the circumstances demand it.

Further, Defendants and the Commonwealth stipulated to the questions on voir dire which were asked. As to the question of sequestration, this was not a capital case. The circumstances did not require it.

In neither situation was there any prejudicial error.

II. Defendants' contention: The Court erred in permitting the introduction of an inflammatory red rubber ball in evidence in depicting the cancerous tumor removed from the decedent at autopsy.

The rubber ball was an ordinary rubber ball. The red color was not a brilliant red and the ball was used for demonstrative purposes only and was permitted as there was absolutely no inflammatory aspect of a ball and the ball was used to show the proximate size of the tumor.

The Court had refused to allow photographs of the deceased child and to allow a yellow beeswax replica of the tumor; however, the ball being an ordinary ball was permitted by the Court for demonstrative purposes.

Defendants are really grasping at a straw in raising this issue. No prejudicial error was here in any sense of the word.

III. Defendants' contention: The Court erred in permitting testimony of Dr. Haluska, a dentist, to be introduced in the Commonwealth's case in chief.

Treatment by the Defendants as to dental procedures *they* had had was a medical treatment and part of the Commonwealth's case; particularly, after the pastor of the Faith Tabernacle Church had testified as to excluding under the Church Doctrine x-rays by dentists after reports by the medical profession that said x-rays may be harmful and further, testimony by witnesses that no sanctions are brought by the church against those members who seek medical assistance.

The Commonwealth had a right to produce such testimony; it was proper; and there was no prejudicial error.

IV. Defendants' contention: The Court erred in refusing the child welfare caseworker who investigated for possible abuse to testify in Defendants' case in chief.

The caseworker in question did not enter into the picture until well after the death of the child and after the fact. Further, the Defendants at no time were charged with abuse.

There was no prejudicial error here.

V. Defendants' contention: The jury returned verdicts as directed by the impact of the Court's charge, having been left no alternative by which to exercise their own independent determination.

The charge by the Court shows the Court constantly left open the alternative by which the jury could exercise their own independent determination and could have arrived at a not guilty verdict in all cases had they so determined the facts.

Let us list some of those ways:

In the involuntary manslaughter charge, the Court charged that the knowledge requisite to show criminal responsibility for failure to act to seek medical assistance must include knowledge of the risk of danger or life. If the jury found as a fact that Defendants did not know or have reason to know of the risk of danger or life to Justin, they cannot be found guilty of the charge of involuntary manslaughter. If they did know or had reason to know, they could be. (Court's charge, page 16).

If the death of Justin did not result from the failure of Defendants to provide medical assistance, they cannot be found guilty of involuntary manslaughter charge. If it did, they could be. (Court's charge, page 25).

On the good character charge, their option was explained.

(Court's charge, page 33).

If any element were missing as to either charge, the Defendants could not be found guilty; if the charge was not established by the Commonwealth beyond a reasonable doubt the Defendants could not be found guilty; if the Commonwealth did not meet its burden of proof, the Defendants could not be found guilty; likewise, that the medical treatment would have to be within their ability to procure it. (Court's charge, page 22). And if any element as required by the Statute was not established, including definitions of terms as to gross, reckless, knowingly (Court's charge, pages 23 and 24), the jury's alternatives were explained.

The alternatives were well explained to the jury by the Court. Under the law, the jurors are the determiners of the facts and the judges of the facts which duty they performed with their verdicts rendered supported by the testimony.

There was no prejudicial error here.

VI. Defendants' contention: The prosecution and conviction of the Defendants is under all the circumstances an infringement of their individual First Amendment Rights of freedom of religion.

All rights have limitations. A First Amendment Right professed is conditioned upon not being injurious to the rights of others (in this case Justin).

The right of free speech doesn's carry with it the right to yell fire in a crowded theater for kicks. Laws cannot Constitutionally interfere with mere religious beliefs and opinions, but may interfere with religious practice inconsistent with the peace and safety of the State. (12 ALR 2d 746; 42 Am Jur 2d § 16, page 22).

The exercise of the State's power to protect the lives and health of its children over the objections of their custodians is not violative of the Constitutional right to freedom of religion, even though such objection is based on religious grounds. To deny a child medical care necessary to save its life because of one's own religious views, does not fall within the kind of conduct protected by the Constitutional guarantee of religious freedom. (231 MD 388; 190 A.2d 621).

The basic issue in the instant case again, we repeat, is the legal duty of a parent to seek assistance for his or her child when the circumstances demand it.

The parents' religious belief has nothing to do with this duty

and is no defense for the failure to perform this duty. The lead cases in Pennsylvania are as follows:

Involuntary Manslaughter: *Commonwealth versus Breth*, 44 PA County Reports 56 (1915) Clearfield County case.

Involuntary manslaughter: *Commonwealth v. Hoffman*, 29 PA County Reports 65 (1903) Butler County case.

Involuntary manslaughter: *Commonwealth v. Konz*, 450 A.2d 638 (1962); 498 PA 639.

Endangering the Welfare of Children. *Commonwealth v. Mack*, 359 A.2d 770 (1976); 467 Pa 613.

The above opinion also answers the Defendants' questions as to their Motions in Arrest of Judgment. Other issues raised by the Defendants are of a general nature and we determine there is no prejudicial error by the Court as to them.

Therefore, we make the following order:

APPENDIX "D"

IN THE COURT OF COMMON PLEAS
OF CAMBRIA COUNTY, PA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM G. BARNHART and LINDA BARNHART,
Defendants

Nos. C-0424, 0425-82

CHARGES: Involuntary Manslaughter; Endangering the Welfare of Children

BEFORE THE HONORABLE H. CLIFTON McWILLIAMS, JR., PRESIDENT JUDGE, OF THE FORTY-SEVENTH JUDICIAL DISTRICT, PENNSYLVANIA.

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109 S. Center Street
Ebensburg, Pennsylvania

For Defendant, Linda Barnhart;
BRUCE F. McKENRICK, ESQUIRE
109 S. Center Street
Ebensburg, Pennsylvania

ORDER

AND NOW, April 5, 1983, after full consideration, the Defendants' Motions for New Trial and Arrest of Judgement are denied.

BY THE COURT

/s/ H. Clifton McWilliams, Jr., P.J.

H. Clifton McWilliams, Jr., P.J.